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ABSTRACT

Education must be served by education law. This chapter analyzes determinants to education law and recommends that corrective inquiry begin with the National Organization on Legal Problems of Education (NOLPE). Special interest advocacy groups can be deterrents to education law. For example, the Supreme Court made contradictory decisions in 1982 and 1984 regarding the related services provision of the Education for All Handicapped Children Act. Decisions against school boards over racial segregation from 1954-72 indicated boards' neglect of education during litigation. The Supreme Court has expressed respect for boards as policy-makers, however. Much litigation can be avoided by clarifying codified law, such as the wording problems found in most outdated compulsory education statutes. Collective bargaining is not conducive to education, with its confrontational approach and tradeoff methodology. Federal and state bodies tend to prescribe details of operation to local school authorities, which hampers adaptations and results in lawsuits. The gravest challenges lie in dispute resolution. Mediation and conciliation should be employed because many educational conflicts need solutions, not victories. (CJH)

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Keeping "Education" in Education Law

E. Edmund Reutter, Jr.
Banquet Speech at NOLPE Convention in Chicago

It has always been a prime thrust of NOLPE to assist educators in learning about those aspects of law that are pertinent to education. Also, over the years the organization has been outstanding (and, for a substantial period, unique) in its help to lawyers who wanted to know about the law that affects education. Today, what was then a field explored by few, has become a bustling focus of legal activity, and the numbers of persons, organizations, and publications devoted to it have proliferated. Yet NOLPE remains alone as the organization that brings educators and lawyers, occupying various positions relative to their professions, together for the good of education (and, through it, the good of society). Lawyers within states and nationally have awakened to a field that can be very profitable for them as well as providing psychic rewards. Unfortunately for education, many of the attorney groups putatively dedicated to education law are in grave danger of succumbing to the notion that "legal" ways of thinking and techniques of legal research, procedure, and argumentation are all that is needed. Educators too are culpable in that to some of them education law is simply something to be left to lawyers. To some others, it is simply something with which to contend rather than something to be shaped and directed as a positive force for improvement of education. There is peril that at points in education law the law component, instead of protecting and enhancing the substantive education component, may be strangling it. This is not necessary. It is not good. We should not let it happen.

The Marriage of Law and Education

In order to properly serve the public interest in education in our society it is necessary to forge effective relations between the professions of education and of law. This involves special liaisons among educators who are conversant with law and lawyers who are conversant with education. To say that to this group may seem like preaching to the converted. But perhaps even we can stand a reminder that education is the enterprise to be served within a framework of law, not the converse.

Education law represents the intersection of two bodies of knowledge and practice, both absolutely integral to a flourishing society. It obviously is necessary that institutionalized education function within bounds that are recognized as the law. Although specifics may differ, this is true whether we are looking at public or private education, at

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lower or higher education. The legal constraints are articulable as (1) prescriptions (something must be done – cause shown before terminating a contract), (2) proscriptions (something must not be done – employment decisions based on gender), (3) optional powers (something may be done – moderate corporal punishment administered to students). The value judgments (something should or should not be done) essentially are derived not from law but from considerations of educational expertise, public policy, and ethics. The law tells what is mandatory and what is permissive, not what is wise or feasible.

In contrast to most circumstances in education, there are ultimate answers in the law at a given moment on given facts. Each question posed to a court is answered yes or no. The format for obtaining answers is adversarial. Judges base decisions on what is presented to them by the two sides. Independent supplemental investigation or research is not conducted. Thus it becomes essential to have the educational rationale for a challenged action presented clearly and persuasively. It is at this point that the educator must play a key role to be certain that this is done. Insertion of educational points with records, research, and validated experience to support them is critical to achieving proper outcome at the trial. If the educational element seems not strong enough in light of the rights of the other party, then the case simply should not go to trial. The attorney should help the client to face up to such a situation rather than to proceed "on a wing and a prayer." The bringing or defending of weak cases has mushroomed in recent years to the detriment of education and society.

Teacher organizations, special interest advocacy groups, and school boards seem equally guilty of degrading the educational ingredient in school law cases. On occasion they seem willing to spend large sums of money almost whimsically. Consider, for example, some cases carried to the Supreme Court and there decided unanimously.

Not one Supreme Court Justice in 1979 agreed with the teacher association's argument that a teacher on tenure could not be discharged for refusing to take inservice courses – and this when the association concurrently was seeking higher salaries and benefits for teachers because of the qualifications and dedication of those so employed.[1]

Another flagrant denigration of the education element can be found in the teacher association argument unanimously rejected in 1976 that where there is collective bargaining, a teacher who is not a union representative cannot speak at a school board meeting open to the public about a topic that is subject to bargaining.[2] The union contended that such was an unfair labor practice, despite the fact that the president of the union had spoken on the union's position at the open meeting and that the teacher, who was a nonmember, spoke for only two-and-one-

1. Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979).

2. City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

half minutes. (The teacher had urged further deliberation before institution of an agency shop provision, a course the board followed.)

Special interest advocacy groups also can be agents for skewing the education element in law. Overly zealous pursuit of gains, even for a truly disadvantaged group, can distort the picture. Again taking as example a unanimous Supreme Court decision, there is the 1979 case in which it was urged that in a discrimination context the definition of "otherwise qualified handicapped individual" be one "qualified in every respect except as to limitations imposed by the handicap." However, the Court held that the phrase meant one "who is able to meet all of a program's requirements in spite of his handicap."[3] (The Court added that mere assumptions as to the effect of a handicap were not acceptable. Further, the Court said that reasonable accommodations must be examined before disqualifying a person with a handicapping condition.)

Even statutes intended to benefit specific groups need to be construed in the light of fiscally-responsible educational considerations, both as to the beneficiaries and as to others. Thus, when it was sought under the Education for All Handicapped Children Act of 1975 to have a school district furnish a sign-language interpreter for a deaf elementary school student who already was receiving substantial specialized instruction and related services and who was performing above average when mainstreamed, the Court by a six-to-three vote held that the student was not entitled to the interpreter.[4] On the other hand, the Court last year unanimously required a school board to provide the "related service" of catheterization every three or four hours, a procedure that can be performed in a few minutes by a lay-person with less than an hour's training and without which a child could not attend school.[5]

Other school boards have been guilty of neglecting or perverting the educational element in some of their involvements with the courts. The most extensive and dramatic example involves racial segregation, with millions of dollars of tax money spent to defend policies that had even less support educationally than constitutionally. The uninterrupted stream of unanimous Supreme Court decisions against school boards from 1954 to 1972 in school desegregation cases is unparalleled in Supreme Court history.[6]

Also, without convincing a single Justice, a school board argued in 1968 that it could dismiss a tenured teacher for writing a letter to the newspaper that was critical of how it had handled some bond issue proposals and its subsequent allocation of financial resources between academic and athletic programs. The Court commented that "the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were

3. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

4. Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982).

5. Irving Indep. School Dist. v. Tatro, 104 S. Ct. 371 (1984).

6. *See* E. Reutter, Jr., The Supreme Court's Impact on Public Education 54-74 (1982).

per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools."[7]

Likewise devoid of any Justice's support in a 1972 Supreme Court decision was the argument that on a public college campus a student organization could be deprived of recognition privileges because the president of the college found the philosophy of the group and of the national organization with which the local was loosely affiliated to be "counter to the official policy of the college."[8] The Court observed that "the college classroom with its surrounding environs is peculiarly the 'market place of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[9]

Such recognition by the Supreme Court of the importance to our society of public education on all levels and of the need to keep it free from control by any body has been made in many contexts.[10] Respect for the teacher as professional and for various boards as educational policy makers frequently has been expressed by the Court. The very different treatment of academic matters from disciplinary matters as regards constitutional due process is a prime example.[11]

Outdated Statutory and Policy Language

While many of the forces that lead to wasteful education-law litigation are beyond the control of educators and most lawyers, some areas for study and joint action can be identified. Many cases can be avoided or blunted simply by being clear in the codified law pertaining to the subject. What should be in writing? How should it be worded to avoid misunderstandings? This involves both knowledge of legal meanings and connotations of words that also are used in general communication, and knowledge of the subject area along with the types of problems that may arise under the policy. Arguments about meaning that might be plausible enough to withstand summary judgement often can be completely eliminated by anticipation in the code. For example, a salary schedule statement that vertical progress from step to step is based on satisfactory performance eliminates the argument that increments are automatic. Specification that horizontal progress depends on completion of courses in institutions accredited by the National Council for Accreditation of Teacher Education or the State Department of Education aborts the claim for credit for a course at a diploma mill.

Unnecessary problems with wording must be corrected at all levels, from statutes to discipline rules in individual buildings. Many statutes

7. Pickering v. Board of Educ. of Township High School Dist. 205, 391 U.S. 563, 570 (1968).
8. Healy v. James, 408 U.S. 169 (1972).
9. *Id.* at 180-181.
10. Reutter, *supra* note 6, at 188-189.
11. *Id.* at 149-154.

have not been examined since they were written in simpler times. Compulsory education statutes—the backbone of American democracy—increasingly are coming under technical fire by those who want to go their own way free of responsibilities to a government that they perceive as overbearing. Most of these statutes were written for a different era. They are vulnerable to attack on some grounds that easily could be removed if the statutes were rewritten.[12] Then focus would be on educational substance other than on vagueness or overbreadth. The proper balance between rights of parents, both religion-based and otherwise, and rights of society could be more effectively addressed. A statute that can be invalidated on grounds of vagueness or overbreadth is poorly drawn and should be rewritten if its purpose remains desirable.

The most serious source of poor phrasing, however, is the archetypical collective bargaining contract that is agreed to only after the ritualistic "all-night bargaining session." The mischief of this situation can be compounded by the common act of slipping in at the end of the lengthy agreement a general arbitration clause. The result is to give up to an arbitrator (whose selection and educational qualifications frequently are not carefully considered by the parties, and whose powers usually are not carefully delineated in the contract) the authority to determine questions of educational import and to do so devoid of the court-system's parameters of stare decisis and appeal. Such a scenario becomes scarier when educational items, as distinguished from economic items, are so decided.

In fact, the very process of collective bargaining with its confrontational approach to determination of contract terms, its trade-off methodology, its deadlines, and its secrecy until the final product emerges as a unit, is uncongenial to getting the educational ingredient into the mix that eventually becomes the contract. However, as collective bargaining in the traditional mode has provided jobs for many educators and even more attorneys, it may be naive to expect much pressure to correct all of the expensive excesses that do not contribute to education. Yet one can hope for some statesmanship that would preserve the notable advantages of bilateral decision-making in education without the debilitating byproducts of inclusion of improper items and language that is imprecise.

Another deterrent to effective education law is to be found in the recent tendency for federal-level and state-level bodies to prescribe details of operation to local school authorities. It can be assumed that such pronouncements are well intentioned, and can and do prevent undesirable local practices. Undoubtedly much good has come from them. But not only can detailed prescriptions hamper local adaptations and initiatives, but they can provide predicates for assorted frivolous lawsuits by persons claiming that alleged rights so granted have been

12. *See* E. Reutter, Jr., The Law of Public Education 668-672 (3rd ed. 1985).

infringed. This phenomenon is particularly true when language appears to be mandatory rather than suggestive, when language is vague, and when the subject is process rather than substance.

Indeed, self-induced, not constitutionally required, due-process chains can be found binding many education authorities, and education can suffer needlessly. The Education for All Handicapped Children Act of 1975 appears to exalt process. So do many codes of student conduct and many provisions related to teacher evaluation in public schools and colleges. There is, of course, a revered place in our society for due process, and such should be true in our educational system. But the process due is not the maximum possible. Once granted, however, in public or private schools, authorities must observe the process under either constitutional or contract theory. We must be as certain that inclusion of specific due process provisions enhances educational values as we are certain that absence of minimum due process elements leads to legal as well as educational problems.

Dispute Resolution

It is in the area of resolution of disputes that perhaps the gravest challenges to ingenuity lie. The resolution of disputes in an adversarial manner, whether by courts or by arbitrators, needs reassessment. Perhaps it has become too easy to activate complex mechanisms to deal with minor and idiosyncratic complaints. Light punishments for misconduct and trifling adverse academic decisions regarding students, as well as trivial matters related to employed personnel, increasingly are being contested in courts. Are such matters the proper province of courts, or would other types of tribunals better serve society? The extent to which the issue is educational would seem to be the measure of the need for expertise in the decision. Although arbitration could provide this, selection and functioning of arbitrators frequently makes the process little different from the courtroom.

We must do more in education law with mediation and conciliation. Many education conflicts need solutions, not victories. More informality and emphasis on seeking the best solution often would seem preferable to a highly structured combative atmosphere leading to a rigid order of court or arbitrator. The more complex the issues, the more difficult it is to get good education into such orders. The device of the consent decree has worked well in many situations where the development of the decree has involved broad and knowledgeable participation. But the detailed consent decree can be subject to the types of evils referred to in connection with state-level regulation and collective bargaining contracts, with the added factor of difficulty in getting any changes made once the decree is issued.

Where persuasion fails, an adjudicator who is familiar with the environment of the controversy has the potential to provide a particularly effective solution. Educationally oriented adjudicators, whether special

arbitrators or state officials, can be expected to issue orders sensitive to educational concerns, yet within legal contours.

With all respect due to the adversarial process that is at the heart of our judicial system, there are situations where jurisdiction in courts probably should be circumscribed or not lie at all. There are, to be sure, constitutional and section 1983 considerations to be met, but the Supreme Court has frequently commented that the federal judiciary is not the inevitable answer.

In 1968 the Court said:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.[13]

In 1976, it commented:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. ...The United States Constitution cannot feasibly be construed to require federal judicial review for every...error.... The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.[14]

Stated in 1975 and repeated in 1982 was:

> Section 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations.[15]

A Question of Money?

A few months ago, in upholding a federal statutory limitation on fees that may be paid to an attorney or agent for representing before the Veterans Administration a veteran seeking benefits for service-connected death or disability, the Court recognized as a valid intent of Congress that the system be informally and nonadversarily administered so that the veteran would not need an attorney to get benefits and not have to divide an award with an attorney.[16] The Court majority's discussion of how the participation of lawyers can affect proceedings and how sometimes such can militate against significant purposes of some hearings is instructive, although the point is really not esoteric.[17]

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13. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
14. Bishop v. Wood, 426 U.S. 341, 349-350 (1976).
15. Wood v. Strickland, 420 U.S. 308, 326 (1975); Board of Educ. of Rodgers, Arkansas v. McCluskey, 458 U.S. 966, 970 (1982).
16. Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180 (1985).
17. *Id.* at 3191-3192.

Indeed the question of attorney fees is an important one to today's topic. There is no question but that the articulation of many rights that are now settled in education law would have, at best, been delayed and, at worst, denied had it not been possible to obtain attorney fees for plaintiffs prevailing against school and other government authorities. Yet there is strong reason to believe that awards of attorney fees can encourage suits that should not be brought. Even though *Carey v. Piphus*[18] may have dampened some ardor for bringing a minor due process suit when the resultant deprivation is probably defensible and only nominal damages may be obtained, the possible award of fees can be attractive to an attorney with spare time.

Perhaps some limits on types of suits and types of activities by lawyers that are covered and on amounts of fees would help strike a balance between the desirability of having civil rights vindicated and the debilitating effects of meritless litigation against schools. The idea of holding those who bring frivolous suits accountable by assessing against them the costs of defense has some potential, but there is a grave danger therein of chilling some suits that might advance new theories or challenge matters of stare decisis.

Conclusion

What should be done to help insure that education is served by education law? Answers are complex and require deliberation by leaders in education, leaders in law, and philosophical and political leaders in society. First steps toward solving a problem are to recognize it in gross dimensions, to describe it, to define it, and to refine it into manageable elements that can be examined in theory and experiment. This process I have tried to nudge with today's remarks. NOLPE is uniquely the body to foster the inquiry. Educator members might give more personal attention to the challenge, as well as introducing the problem to other organizations of educators. Lawyer members might do the same in their specialized groups. Inevitably a more cross-disciplinary approach will be enhanced between schools of law and schools of education on the university level, between organizations of lawyers and organizations of educators on state and national levels, and between school authorities and their legal counsel on the firing line.

More attention must be given both to preventive law and to constructive law. Efforts are needed to avoid or impede unnecessary, meritless, or political lawsuits; but concurrently we must not fail to pursue paths of educational principle even if such may require litigation for vindication. We should seek honorable means of resolving controversies short of full-blown adversarial proceedings. When litigation comes, however, we must be certain that the educational elements are fully developed at the trial. We must seek to use the law as a support for good educational practice legislatively, administratively, and judicially.

18. 435 U.S. 247 (1978).

Unlike the situation when we met in our first national convention a few miles from here thirty years ago, the major danger today for education may well be not that bad educational practices may lead to lawsuits, but that good educational practices will be abandoned because of fear of lawsuits – not only fear of losing (which itself often is unfounded), but fear of costs of defense. Overcaution, rather than undercaution, may have become our demon. Yet, I believe it is a demon that can be exorcised by enlightened cooperation between educators and lawyers if only we set our collective minds to it. And where better to start than through NOLPE?